

Draft Proposed Order for Tribal Discretionary Participation in Non-ICWA Cases

Dean T. Stout, Judge (Ret.) Superior Court of California, County of Inyo
Judge, Judicial Council of California's Temporary Assigned Judges Program
Chief Judge, Bishop Paiute Tribal Court

To the ends of serving the best interests of Native American and Alaskan Native children by establishing, developing, and maintaining the child's political, cultural, and social relationship with their tribe and tribal community; obtaining relevant information that will enhance the Court's decision making; and where appropriate, promoting the child's rehabilitation and ensuring community safety, this Order shall apply to all juvenile justice (formerly juvenile delinquency), status offense, and dependency cases¹; including, but not limited to, detention hearings, dispositional hearings, and post-dispositional review hearings, which involve a Native American or Alaskan Native Upon initial contact with a child, the Probation Officer and Child Protective Services (Child Welfare Director) shall promptly carry out their affirmative and continuing duty to inquire whether the child is an Indian child or has Native American/Alaskan Native heritage. (See WIC § 224.2(a); *In re W.B.* (2012) 55 Cal.4th 30, 40)

This Order is intended to ensure prompt identification of Native American and Alaskan Native children, notification to the child's tribe, and active participation by a representative from the child's tribe in said proceedings.

The Court finds that public policy favors early tribal access and participation in all dependency, status offense, and juvenile justice cases involving a child with Native American or Alaskan Native heritage. The Court is committed to protecting the essential tribal relations and best interest of Native children by promoting practices that protect the child's right to establish, develop, and maintain a political, cultural, and social relationship with the child's tribe and tribal community. (See WIC § 224(a))

The Foster Care Bill of Rights (WIC § 160001.9) protects the rights of all children in foster care to cultural connections and rights - specifically protecting the rights of Indian children to access their Tribes and Tribal Representatives regardless of whether in foster care through dependency or delinquency. The Court finds that it is in the best interest of Native children to have those rights protected, even though they may not be in foster care or at risk of entering foster care.

¹ California Welfare & Institutions Code §§ 300, 601, and 602.

Early identification of Native youth and their Tribe(s), along with providing for early access and participation in the child's case, will ensure that if and when the child becomes at risk of entering foster care, Probation and Child Welfare agencies can fulfill their mandate to integrate into the case plan input from the "...child's identified Tribe" in a timely manner. (See WIC §§ 727.1 and 10501.1 (c))

California Welfare & Institutions Code section 306.6 specifically allows for participation of unrecognized tribes in dependency proceedings.

This Order is intended to promote early discretionary access and participation by the child's tribe, so to assist the court in making decisions that are in the best interest of the child, and where appropriate, promoting rehabilitation and public safety, through the Tribal Representative's ability to inform the court and parties to the proceeding about placement options for the child within the child's extended family or tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's parents may have as Indians.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED as follows:

1. The County Probation Officer and the County Child Protective Services (Child Welfare Director) shall upon initial contact with a child for whom a petition has been or may be filed under WIC sections 300, 601, or 602, shall promptly carry out their affirmative and continuing duty to inquire whether the child is an Indian child, or for purposes of this rule, has Native American or Alaskan Native heritage. (See WIC section 224.2(a); *In re W.B.* (2012) 55 Cal.4th 30,40)
2. Upon receiving any information creating a reason to believe that the child is or may be an Indian Child or has Native American heritage, the Probation Officer or Social Worker shall forthwith give notice to the child's tribe(s). Said notice to the child's Tribe may be informal notice to the Tribe's designated ICWA Representative or Tribal Chairperson, by any reasonable means to ensure timely notice of proceedings, which may include telephone, fax, email, hand delivery, and/or mailing of informal notice.²

² Should the notice and other substantive provisions of the ICWA apply or become applicable to the child's case, it should be noted that any notice provided under this Order may not necessarily constitute proper legal notice to the Tribe as required by the ICWA.

3. This Order applies to all such cases and children even though any of the following circumstances exist:

- The notice and other substantive provisions of the Indian Child Welfare Act (ICWA)³ do not apply;
- The child's tribe is not a "federally recognized" tribe;
- The child is not technically an "Indian child" within the meaning of the ICWA;
- The child is of lineal descent and involved in a tribal community, but is not enrolled or eligible for tribal enrollment; and,
- The child is not in foster care or "at risk" of removal or entering foster care.

4. The Court finds that for any child described herein, their identified Tribe presumptively has a "direct and legitimate interest" in the child's case and is entitled to access. (See WIC sections 346 and 676(a)) The Tribal Representative (e.g., ICWA Representative) shall be allowed to attend otherwise confidential juvenile justice, status offense, and dependency proceedings pertaining to such Native child, subject to the judicial officer presiding over the case or particular hearing determining that said Tribe and/or Tribal Representative does not have a direct and legitimate interest in the particular case, or that good cause otherwise exists to exclude the Tribal Representative from a particular hearing(s), or portions thereof.

5. For the reasons set forth above, in addition to being present at such hearings, the Tribal Representative may do all the following upon consent of the court:

- Address the court.
- Request and receive notice of hearings.
- Request to examine court documents relating to the proceeding.
- Present information to the court that is relevant to the proceeding.
- Submit written reports and recommendations to the court.
- Perform other duties and responsibilities as requested or approved by the Court.

6. If more than one tribe is identified or requests to participate, the Court may limit participation to the tribe with which the child has the most significant contacts, as determined in accordance with Family Code § 170(d)(2)).

³ 25 U.S.C. § 1901 *et seq.*; California Welfare & Institutions Code § 224 *et seq.*; California Rules of Court, rule 5.480 *et seq.*